

COMPLIANCE BOARD OPINION No. 97-1
--

January 14, 1997

Michael S. Nagy, Esquire

The Open Meetings Compliance Board has considered your complaint of November 21, 1996, concerning the Queen Anne's County Board of Zoning Appeals. In that complaint, you allege that the Board of Appeals held an unlawfully closed meeting on September 5, 1996, and failed to comply with the procedural requirements that the Open Meetings Act imposes on public bodies that hold a closed meeting.

In our opinion, although the Board of Zoning Appeals had a lawful basis for holding a closed session on September 5, 1996, the Board's discussion in closed session exceeded the bounds of the exception cited by the Board. In addition, the Board failed to comply with the Act's requirement for preparation of a written statement prior to a closed meeting.

I

Circumstances Surrounding the Closed Session

In this portion of the opinion, the Compliance Board has drawn facts from your complaint and the attachments to it; the timely response of the Board of Zoning Appeals, submitted on its behalf by its counsel, J. Donald Braden, Esquire; and your additional submission by letter of December 13, 1996.

The underlying substantive issue before the Board of Zoning Appeals was a request by a property owner for approval of plans to build a private aircraft landing strip. Some of the neighbors were adamantly opposed to the landing strip. The property owner, Mr. Kevin Ayala, had submitted applications prior to the one considered at the meeting in question. Indeed, a decision of the Board of Zoning Appeals on a prior application had been overturned by the Circuit Court for Queen Anne's County. *In the Matter of Kevin L. Ayala*, Civil No. 90-02409 (April 3, 1992).

After the Board initially approved Mr. Ayala's most recent application, in light of the Circuit Court's analysis of the law in the 1992 opinion, those opposed to the landing strip took the matter to court once again. On August 13, 1996, Judge Sause, of the Circuit Court for Queen Anne's County, issued

a bench ruling reversing the decision of the Board of Zoning Appeals and remanding to the Board for further proceedings.¹ By letter of August 23, 1996, Mr. Braden informed you and counsel for Mr. Ayala of his intention “to discuss the legal issues related to Judge Sause’s ruling on September 5, 1996 with the Board. You will be apprised of the direction of the matter promptly after it is determined. Minutes of these legal discussions will be filed in the file.”

According to the affidavits of the members of the Board, after an open meeting on September 5, “it was unanimously noted [*sic*] to conduct an executive session for the purpose of obtaining legal advice from counsel with regard to the decision by Judge Sause rendered in the most recent Ayala application.” Minutes of the closed session prepared by Mr. Braden reflect “a unanimous vote to meet in closed session ... in order to obtain legal advice under §10-508(a)(7) of the State Government Article.”

According to the minutes, the Board discussed the meaning of the two Circuit Court decisions involving Mr. Ayala’s application and “then discussed and made ... findings on mixed questions of law and fact ...” The minutes reflect eleven specific findings evidently made by the Board in the closed session of September 5. For example, the Board concluded that Mr. Ayala “evidenced federal and state aviation authority approval” and that “[n]o building or hangar is proposed in the application.”

Finally, at an open session on October 10, 1996, the Chairman of the Board read into the record the content of the draft minutes that had been prepared by Mr. Braden, who was himself not present on October 10. With no further discussion, the Board then approved Mr. Ayala’s application.

II

Legal Analysis

A. Basis for Closed Session

The Open Meetings Act authorizes a public body to meet in closed session to “consult with counsel to obtain legal advice.” §10-508(a)(7) of the State Government Article. This exception was the asserted basis for the closed portion of the September 5 meeting of the Board of Zoning Appeals.

¹ On October 17, 1996, the Court issued a written order reversing the Board’s approval and remanding to the Board “for further proceedings not inconsistent with this ruling.” According to the written order, the Court’s reasons were those “set forth in the ... transcript of my remarks at the conclusion of the hearing on August 13, 1996”

There can be no doubt of the Board's entitlement to invoke this exception. The Board would surely want its lawyer's advice about the meaning of the Circuit Court's two decisions, as they might affect the application then pending before the Board. As we have previously observed, however, "[o]nly the presentation of legal advice is permitted in a session closed on this basis." Compliance Board Opinion No. 96-7, at 2 (May 16, 1996). The "legal advice" exception may not be used "as a mask for policy deliberations. Once the advice has been sought and provided, the body must return to open session to discuss the policy implications of the advice that it received" Compliance Board Opinion No. 95-11, at 5 (December 18, 1995). The "legal advice" exception did not authorize a closed discussion in which the Board of Zoning Appeals made all of the crucial findings about an application. The Board's discussion went beyond the confines of the exception.

Yet, we also note a basis in the Open Meetings Act for the entire discussion to have been closed. Under §10-508(a)(8), a public body may "consult with staff, consultants, or other individuals about pending or potential litigation." Under the circumstances presented here, the Compliance Board believes that the Board of Zoning Appeals could permissibly have invoked the "litigation" exception to permit closed discussion of the entire matter. The Ayala application had already resulted in two court proceedings. The Board of Zoning Appeals had every reason to regard its decision as likely to be challenged by the disappointed side. Therefore, the substance of its decision would likely be the subject of "potential litigation" and could permissibly have been discussed fully with the Board's counsel or other individuals in closed session.

To be sure, the Board of Zoning Appeals did not cite §10-508(a)(8) as the basis for closing its session, relying instead on the narrower "legal advice" exception. The Board's failure to invoke the proper exception violated the Act. Nevertheless, the Compliance Board believes it important to point out that the public was not deprived of any rightful entitlement to observe the closed discussion at the September 5 meeting. Had the Board of Zoning Appeals invoked §10-508(a)(8), the entire discussion would lawfully have been closed.

B. Procedural Requirements

The Act requires certain formal steps "before a public body may meet in closed session."² First, the presiding officer must "conduct a recorded vote on

² In general, these procedural requirements, like the rest of the Act, do not apply when a public body is engaged in an "executive function" or a "quasi-judicial function."

the closing of the session.” §10-508(d)(2)(i). The presiding officer is also responsible for seeing to it that a written statement is prepared, setting out the “reason for closing the meeting,” the specific provision of the Act that allows the meeting to be closed, and “a listing of the topics to be discussed” at the closed session. §10-508(d)(2)(ii).

Even if a public body has a basis under the Act’s list of exceptions to conduct a closed session, the public body must conduct its vote to close the meeting and issue the required written statement in open session. “Members of a public body are accountable for their decision to hold a closed session, and part of their accountability is to make that decision before the public that is about to be excluded.” Compliance Board Opinion No. 96-12, at 3 (November 20, 1996).

According to the minutes prepared by Mr. Braden and the affidavits of the Board members, the Board conducted a vote prior to going into closed session. The affidavits of the Board members indicate that this vote occurred “after the applications set for that evening had been completed.” From this description, the Compliance Board cannot tell whether the vote occurred after the members of the public who had attended the hearings had left. It is not clear, in other words, whether the vote occurred under circumstances in which members of the public did not have a genuine opportunity to observe it. *See* Compliance Board Opinion No. 96-12, at 3. The record is insufficient for the Compliance Board to offer an opinion on this point.

What does seem clear is that the Board of Zoning Appeals did not issue the required written statement prior to its closing the meeting. The Board did not provide us with any written statement, nor did it suggest that one had been prepared. Therefore, the Compliance Board finds that the Board of Zoning Appeals violated the requirement in §10-508(d)(2)(ii) that a written statement be made of the reason for closing the meeting, the statutory authority to do so, and a listing of the anticipated topics.

The Act also requires that, following a closed session, the minutes for a public body’s next open session are to include the following information:

a statement of the time, place, and purpose of the closed session;
record of the vote of each member as to closing the session; a
citation of the authority under [the Act] for closing the session;

§10-503(a)(1). The Board of Zoning Appeals, however, is subject to the Act’s procedural and substantive requirements whether or not it is not carrying out an executive or quasi-judicial function. §10-503(b)(2).

and a listing of the topics of discussion, persons present, and each action taken during the session.

§10-509(c)(2). The Compliance Board finds that the Board of Zoning Appeals did not violate this requirement. A statement made at the next open session, on October 10, contained all of the required information, and this statement was subsequently reduced to writing, labeled “excerpts of the minutes.”

III

Conclusion

In summary, the Open Meetings Compliance Board finds that the Queen Anne’s County Board of Zoning Appeals violated the Open Meetings Act by conducting a discussion that exceeded the limits of the exception cited as the basis for closing the meeting, although the Compliance Board notes that a different exception, had it been cited, would have permitted the closed discussion that the Board of Zoning Appeals in fact held. The Board of Zoning Appeals also violated the Act by failing to prepare the required written statement in advance of the closing of its session on September 5, 1996.

In your complaint, you requested the Compliance Board to determine that the Board of Zoning Appeals “knowingly and willfully” violated the Act and impose civil penalties. The civil penalties provision of the Act is §10-511:

A member of a public body who willfully participates in a meeting of the body with knowledge that the meeting is being held in violation of the provisions of [the Act] is subject to a civil penalty not to exceed \$100.00.

The Compliance Board has no authority to enforce this provision; only a court does. *See* §10-502.4 (duties of Compliance Board). Indeed, a Compliance Board opinion is not even admissible in a court proceeding. §10-502.5(j). Nor does the Compliance Board have the ability to discern the motives or mental state of members of a public body at the time that a violation occurs. Therefore, the Compliance Board will limit itself to applying the Act to the facts presented and declines to comment further.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb, Esquire